REMARKS

Claim 1-5 and 19-21 are currently in the application. No Claim stands allowed.

The drawings of the present application are objected to in that"...the flange physically disposed internally of the container must be shown or the feature(s) canceled from the claim(s)". Figure 7A has been added to the drawings of the present application. This Figure 7A depicts that embodiment of the present invention wherein the flange is physically disposed internally of the container. Such embodiment is described in paragraph [0037] of the specifications, to wit:

> "Whereas the base flange 34 is shown as being bonded to the outer surface 66 of the panel 14 of the container, it is more common to insert the fitment [wall 38] through the opening 58 from the interior of the container so that the base flange 34 is bonded to the inner surface 68 of the panel 14."
>
> Accordingly, no new matter is added by the addition of new Figure 7A.

Claims 1-5 stand rejected under 35 USC § 102(b) as being anticipated by US 5,875,958 to Weiteder el al.

The Law of Anticipation

> A person shall be entitled to a patent unless the invention was patented or described in a printed publication in this or a foreign country or in public use or

on sale in this country, more than one year prior to the date of application for patent in the United States. 35 U.S.C. §102(b).

Section 2131 of the Manual of Patent examining Procedure describes the basis for anticipation under 35 U.S.C. § 102 where it is stated:

> "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California,,* 2 USPQ 2d 1051, 1053 (Fed. Cir. 1987). "The identical invention must be shown in as complete detail as is contained in the ...claim." *Richardson v. Suzuki Motor Co.,* 9 USPQ 2d 1913, 1920 (Fed Cir 1989). The elements must be arranged as required by the claim. *In re Bond,* 15 USPQ2d 1566 (Fed. Cir. 1990).

The Examiner's Rejection

In the rejection of Claims 1-5, the Examiner states:

"Weiteder shows a fitment attached to a perimeter of opening 10 on top wall 1A of container 1, seen in Fig. 1, having a flange with a upstanding walls 3 and 12 (sic) forming a pour conduit with a substantially ellipsoidal planar cross section with a minor portion above a major portion, see Figs, 3B and 4, a tier (sic) away membrane 7 at the minor portion and including a pull ring 8 disposed at a location spaced apart from the top wall, see Figs. 5 and 6, a hinged cap 5 integrally formed with the conduit and having an annular projection 9 with the same geometrical shape of the conduit. Ambient air ingresses into the container through the minor portion of the conduit as product is poured from the container."

Aside from other factors, it is suggested that the Examiner has misunderstood that claimed feature of the present invention set forth in Claim 1 wherein it is stated that:

> "a tear away membrane disposed across and closing said conduit at a location spaced apart from said first wall associated with the top end of the container,"

This feature involving the location of the tear away membrane recited in Claim 1 is contrary to the Examiner's identification of the "...**pull ring 8** disposed at a location spaced apart from the top wall..."(emphasis added) and is a feature of the claimed invention which is not found in Weiteder et al.

Accordingly, it is respectfully contended that Weiteder el al does not anticipate Applicant's Claim 1.

Claims 2-5 are each dependent from Claim 1 and therefore inherit each and every element of their parent claim and any intervening claims and therefore are not anticipated by Weiteder et al for the same reasons, among others, as set forth in the above discussion of the allowability of Claim 1.

Withdrawal of the rejection of Claims 1-5 as being anticipated by Weiteder under 35 USC §102(b) is respectfully requested.

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

35 U.S.C §103(a). In order to support a rejection under 35 U.S.C. § 103(a), "the examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness." MPEP § 2142. pg. 2100-121, 8th ed. "To reach a proper determination under 35 U.S.C. § 103(a), the examiner must step backward in time and into the shoes worn by the hypothetical 'person of ordinary skill in the art' when the invention was unknown and just before it was made." *Id.* The first element in establishing a *prima facie* case of obviousness is that "there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings." MPEP § 2143, pg. 2100-122, 8th ed. The second element is that there "must be a reasonable expectation of success." *Id.* The third element is that "the prior art reference (or references when combined) must teach or suggest all the claim limitations." *Id.*

The relevant facts for finding obviousness relate to (1) the scope and content of the prior art, (2) the level of ordinary skill in the field of the invention, (3) the differences between the claimed invention and the prior art, and (4) any objective evidence of nonobviousness such as long felt need, commercial success, the failure of

others, or copying. *Graham v. John Deere Co.*, 148 U.S.P.Q. 459, 467 (1966: *see Continental Can Co. v. Monsanto Co.*, 20 U.S.P.Q.2d 1746, 1750-51 (Fed. Cir. 1991). The Supreme Court in *Graham* stated that "the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved." *Graham*, 383 U.S. at 17, 148 U.S.P.Q. at 467. The *Graham* court further stated that "[s]uch secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy." *Id.*

The Examiner's Rejection

In the rejection of Claims 19-21, the Examiner states:

"Weiteder shows all claimed features as discussed above except for the circumferential flange affixed to the inner surface of the top wall. Lawson shows a pour fitment for a container as seen in Fig. 3, with a flange 28 designed to be affixed to the inner surface of the top wall of a container 10. It would have been obvious to a person with ordinary skill in the art to provide a more reliable scheme for retaining the pour spout fitment in place as the container is moved from the inserting station to the sealing station during manufacture as taught by Lawson."

As noted hereinabove, contrary to the Examiner's contention, Weiteder et al do not show "all claimed features...except for the circumferential flange affixed to the inner surface of the top wall." Among other things, Weiteder et al. do not show a pull away membrane disposed across and closing said conduit at a location spaced apart from said first wall associated with the top end of the container". Lacking such

disclosure, Weiteder fails a proper primary reference in a combination of patents relied upon as the basis for rejecting Claims 19-21 under 35 USC 103(a). Moreover, it is respectfully submitted that reliance upon Lawson as disclosing the feature of insertion of a fitment into an opening in the top wall of a container from the inside of the top wall of the carton also fails in view of the failure of Weiteder et al.

Further, Claims 19-21 each are dependent from Claim 1, either directly or indirectly, and therefore inherit each and every feature of their parent Claims and any intervening Claims. Accordingly, it is urged that Claims 19-21 are allowable for the same reasons, among others, as set forth herein above in discussing the allowability of Claim 1. Specific note is taken of the fact that Lawson fails to disclose a fitment in which "at least said exit end of said conduit having a substantially ellipsoidal planar cross-section geometry having at least one major portion and at least one minor portion", among other relative features as called for in Claim 1.

Withdrawal of the rejection of Claims 19-21, as being unpatentable over Weiteder et al in view of Lawson is respectfully requested.

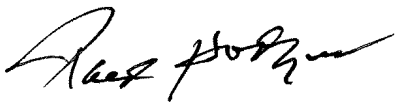
Reconsideration of the application and allowance of Claims 1-5 and 19-21 are respectfully requested.

AMENDMENTS TO THE DRAWINGS

The attached two sheets of drawings include changes specifically, Figure 7 as originally included on Sheet Number 4 has been transferred, without change to Replacement Sheet Number 5. Further, new Figure 7A has been added on Sheet Number 5 so that the related Figures 7 and 7A are viewable on a single sheet of drawings. Replacement Sheet Number 4, thus includes original, unchanged, Figures 5 and 6, and Replacement Sheet Number 5 includes original, unchanged Figure 7 and new Figure 7A. Entry of Replacement Sheets Numbers 4 and 5, is respectfully requested.

Respectfully submitted,

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